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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM J. CLEMONS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

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QUESTION PRESENTED

Whether petitioners' pledged accounts were properly paid to the Federal Savings and Loan Insurance Corporation (FSLIC) to indemnify the FSLIC for amounts it paid to petitioners' former savings and loan association.

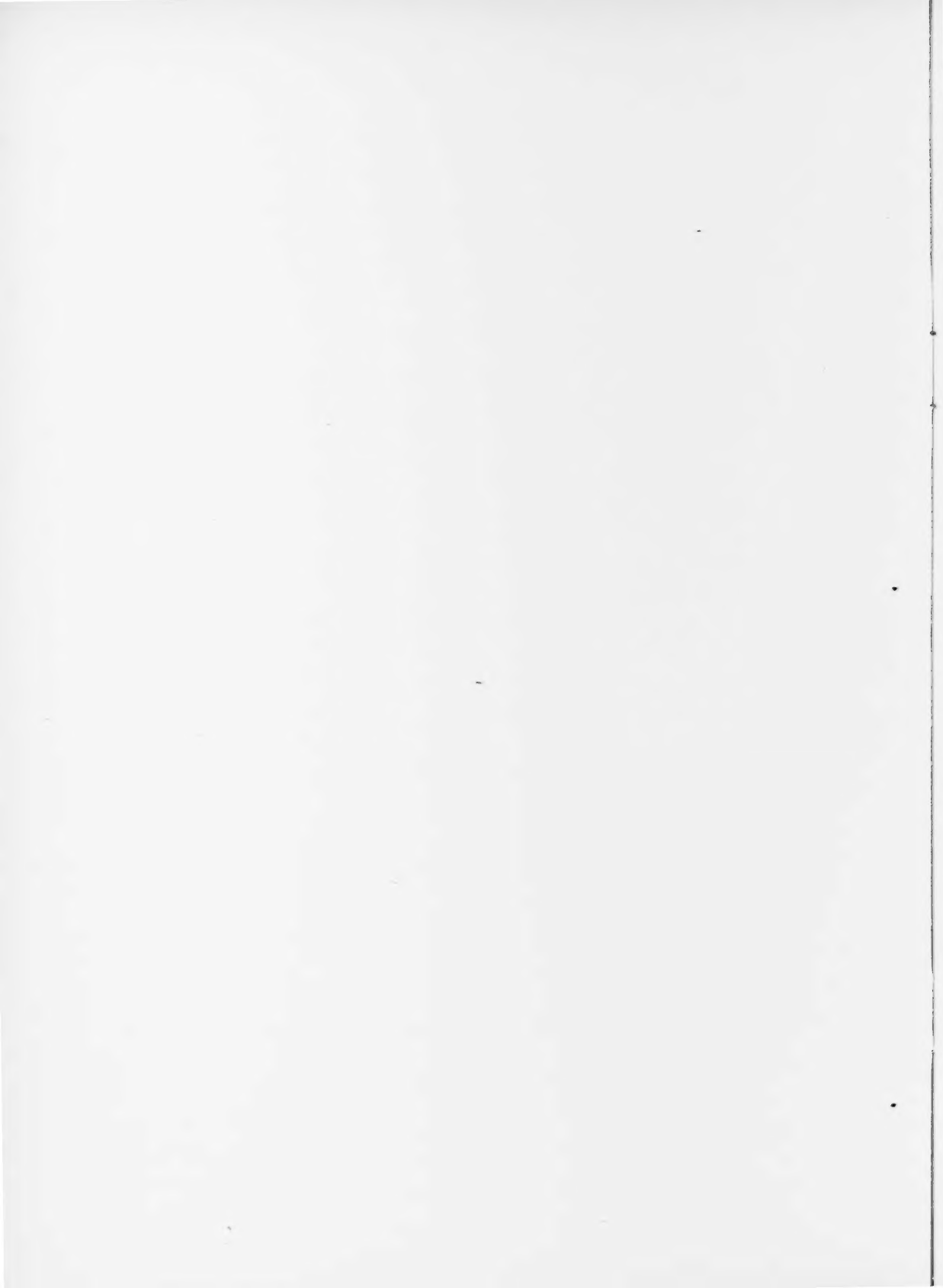


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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 33) and the district court (Pet. App. 10-21, 23-31) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1991. The petition for a writ of certiorari was filed on November 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are organizers and former directors of Magnolia Federal Savings and Loan Association. Pet. App. 10, 12, 23, 25. The Federal Home Loan Bank Board (FHLBB)¹ required petitioners to execute a pledge and escrow agreement as a condition for obtaining a savings and loan charter for Magnolia. Pet. 3. The pledge and escrow agreement provided, among other things, that petitioners would indemnify Magnolia against any loss or operating deficit and that the FHLBB, upon finding a loss or operating deficit, was authorized to apply accounts pledged by the directors to Magnolia's reserves. The pledged accounts of all of the directors totalled about \$80,000.

2. Magnolia encountered financial difficulties. On June 29, 1977, the FHLBB appointed a conservator for Magnolia. The FHLBB also required all Magnolia's directors, including petitioners, to resign. To prevent Magnolia from failing, the FHLBB arranged for the Federal Savings and Loan Insurance Corporation (FSLIC)² to make contributions to Magnolia in accor-

¹ The FHLBB was a federal agency created pursuant to the Federal Home Loan Bank Act, ch. 522, § 17, 47 Stat. 736 (1932), formerly codified at 12 U.S.C. 1437 (repealed 1989). The FHLBB was charged with chartering and supervising savings and loan associations and directing the operations of the Federal Savings and Loan Insurance Corporation. The FHLBB was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 401, 103 Stat. 354 (FIRREA). Following the enactment of FIRREA, the FDIC assumed the FHLBB's role of reviewing receivership claims determinations pursuant to FIRREA §§ 215, 401(f)-(h) 103 Stat. 252-254, 356-357.

² The Federal Savings and Loan Insurance Corporation was a federal instrumentality created pursuant to the National Housing Act, ch. 847, § 402, 48 Stat. 1256 (1934), formerly codified at 12 U.S.C. 1725 (repealed 1989), to insure deposit accounts in savings and loan associations. The FSLIC was under the direction of the

dance with an Assistance Agreement. Pet. App. 12, 25. Gov't C.A. Br.7.

Under the pledge and escrow agreement, the FHLBB was authorized to direct that petitioners' pledged accounts be paid to Magnolia and applied against its losses. Instead of requiring such payments, the FHLBB allowed petitioners' pledged accounts to be repledged pursuant to a Substitute Pledge Agreement. Pet. 3.

Under the Substitute Pledge Agreement, each of the pledgors agreed to indemnify the FSLIC to the extent of the balance in his pledged account for any contribution or payment by the FSLIC to Magnolia under the Assistance Agreement, if that contribution had not been repaid by Magnolia by December 31, 1982, the termination date of the Assistance Agreement. The Substitute Pledge Agreement also provided that, to the extent the pledged accounts were not used to indemnify the FSLIC, the funds would be used to make up any net worth deficiency of the association, up to the remaining balances in the accounts. The agreement set out specific procedures for calling the pledged accounts.³ Any

FHLBB. The FSLIC, like the FHLBB, was abolished by FIRREA. Following the enactment of FIRREA, the FDIC assumed FSLIC's role as receiver for Magnolia.

³ The Substitute Pledge Agreement provided:

If, within 60 days from the termination of the Assistance Agreement, the Supervisory Agent finds that, as of the date of termination of the Assistance Agreement, the pledgors have any obligation to indemnify the [FSLIC] or to restore a net worth deficiency of Magnolia * * *, he shall deliver the documents evidencing title to the pledged accounts to the Association, and the Association shall cancel and terminate the pledged accounts and pay over all or part of the amount * * * to the [FSLIC] or credit all or part of such amount to the reserves of the Association as the Supervisory Agent shall

amounts remaining in the accounts after reimbursement to FSLIC and restoration of Magnolia's capital would be returned to the pledgors. Pet. App. 13, 25-26. The Substitute Pledge Agreement, which was executed by the nine former directors of Magnolia, including petitioners, stated that the accounts were being repledged in consideration of the FHLBB's forbearance in not directing the immediate termination of the pledged accounts. Pet. 3.

3. Under the Assistance Agreement, the FSLIC provided Magnolia with an initial cash infusion of approximately \$700,000, plus an additional \$50,000 in capital. During the term of the Assistance Agreement, the FSLIC made payments in excess of \$800,000 to Magnolia. At the termination of the Assistance Agreement, \$757,200.61 in contributions by the FSLIC had not been repaid by Magnolia. Pet. 4; Gov't C.A. Br. 9-10.

On February 28, 1983, the FHLBB's Supervisory Agent notified Magnolia of the amount of FSLIC's net outstanding contributions and of his finding that the pledgors under the Substitute Pledge Agreement had an obligation to indemnify the FSLIC in the full amount of the accounts pledged. In accordance with the Substitute Pledge Agreement, Magnolia terminated the accounts and paid the pledged amounts to the FSLIC. Pet. App. 13, 26; Gov't C.A. Br. 10.

4. On July 9, 1987, petitioners sued the FHLBB and the FSLIC, alleging that the FSLIC's "confiscation" of

direct in accordance with the terms of this Substitute Pledge Agreement.

* * * * *

Any findings made by the Supervisory Agent pursuant to the provisions of paragraph 4 of this Agreement shall be conclusive and binding upon the parties hereto.

Substitute Pledge Agreement, paras. 4, 6.

4. On July 9, 1987, petitioners sued the FHLBB and the FSLIC, alleging that the FSLIC's "confiscation" of the pledged accounts was racially motivated, violated petitioners' rights under the Fifth and Fourteenth Amendments, and caused them to suffer monetary loss, mental anguish, emotional harm, and disparagement in their community. Pet. App. 13-14. Petitioners sought the return of the amounts pledged plus interest, \$7 million in compensatory damages, \$7 million in punitive damages, and attorney's fees. Pet. App. 10; Gov't C.A. Br. 2. Petitioners later filed an amended complaint adding allegations that the FHLBB and the FSLIC took over Magnolia without a proper hearing, in violation of the Fourteenth Amendment, and that the FHLBB and the FSLIC improperly removed petitioners from the board of directors of Magnolia and replaced them with new directors who engaged in self-dealing and made improper loans. The amended complaint sought to return Magnolia, then in FSLIC receivership, to the control of petitioners. Pet. App. 11.

Petitioners also filed administrative claims against the FSLIC as receiver for Magnolia, which were disallowed. In a decision dated September 14, 1988, the FHLBB affirmed the Receiver's determination. Petitioners subsequently filed a motion requesting judicial review of the FHLBB Decision. Pet. App. 11, 28.

5. The FHLBB and FSLIC filed motions for summary judgment. In April 1989, after reviewing the extensive administrative record compiled by the FSLIC as receiver for Magnolia, the district court issued a decision rejecting most of petitioners' claims. Pet. App. 10-21. The court concluded that petitioners' claims did not fall within the narrow statutory waiver of sovereign immunity that allowed challenges to the

appointment of a receiver.⁴ Pet App. 16-17. The district court dismissed petitioners' constitutional claims, Pet. App. 19, and also dismissed petitioners' tort claims, holding that the Federal Tort Claims Act provided the exclusive means of asserting tort claims against the FHLBB and the FSLIC. Pet. App. 17-18. The court also found that petitioners' complaint did not state a cause of action for breach of contract against the FHLBB or the FSLIC in its corporate capacity, and accordingly dismissed any contract claims against those entities. Pet. App. 18.

In accordance with *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), the court granted petitioners' motion for de novo review of the FHLBB's administrative decision. Pet. App. 20. Both sides subsequently took deposition testimony. Pet. App. 24-25. In December 1989, the district court granted the FDIC's motion for summary judgment.⁵ Pet. App. 23-31. The court concluded that Magnolia had no express or implied duty to indemnify petitioners for the loss of

⁴ Former 12 U.S.C. 1464(d)(6)(A)(1982), in effect at that time, provided in relevant part as follows:

The [FHLBB] shall have exclusive power and jurisdiction to appoint a conservator or receiver. * * * In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court * * * for an order requiring the [FHLBB] to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the [FHLBB] to remove such conservator or receiver.

This Section has since been revised and restructured. The current version of this provision appears at 12 U.S.C. 1464(d)(2)(E)(Supp. I 1989).

⁵ Following the enactment of FIRREA, the FDIC was substituted for the FHLBB and FSLIC as a party to this action.

their accounts; that Magnolia was not unjustly enriched; and that petitioners were not entitled to attorney's fees. Pet. App. 28-31.

The court of appeals affirmed "for the reasons set forth in [the district court's] Opinions and Orders." Pet. App. 33.

ARGUMENT

Although petitioners contend (Pet. 8) that this case involves "novel substantial federal questions of exceptional importance," the court of appeals did no more than apply settled legal principles to a particular set of facts. The court of appeals' decision is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. Petitioners do not contend that the government failed to observe the provisions of the Substitute Pledge Agreement, including the procedures for paying over petitioners' pledged accounts to the FSLIC. As the district court observed:

[Petitioners] point to no provision of the "Assistance Agreement" or the "Substitute Pledge Agreement" which has been violated. In reviewing those documents the court can find no provision which even arguably could have been violated by the FHLBB or the FSLIC.

Pet. App. 18.

In addition, the court of appeals correctly rejected petitioner's tort claims. If petitioners wanted to bring a tort action against the FSLIC or the FHLBB, they were required to comply with the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2401(b), 2671-2680. This they did not do. Even if petitioners had complied with the FTCA, their suit would have been barred under the

“discretionary function” exception, 28 U.S.C. 2680(a). See *United States v. Gaubert*, 111 S.Ct. 1267 (1991).

2. Petitioners contend (Pet. 7-8) that they were deprived of property without due process of law because their pledged accounts were paid to FSLIC without prior notice or a hearing. But petitioners waived any such notice and hearing when they agreed to the specific terms and procedures for forfeiture of their accounts set out in the Substitute Pledge Agreement. See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972).

Petitioners entered into the original pledge and escrow agreement in order to obtain a savings and loan charter. Under the terms of the original agreement, the government could have directed that petitioners’ pledged accounts be paid to Magnolia in 1977. Instead, petitioners reaped the benefits of the government’s forbearance by entering into a new agreement that did not impose any greater liability on them, allowed them to earn interest on the accounts for another five years, and afforded them a chance to get all of their money back if Magnolia could be turned around.

In exchange for those benefits, petitioners agreed that the determination of the Supervisory Agent would be binding and that, upon a determination by the Supervisory Agent that the pledgors had an obligation to indemnify the FSLIC, the Supervisory Agent and Magnolia would take specified actions to terminate their accounts and pay the proceeds to the FSLIC. Petitioners’ agreement to these procedures and their express grant of authority to the Supervisory Agent to determine their indemnification obligation and to carry out the pledge agreement constitutes a waiver of any rights to prior notice and hearing. *Overmyer*, 405 U.S. at 185; *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972).

Because petitioners have failed to demonstrate that they suffered any legal harm, and because no substantial question of federal law is presented by this case, further review of the decisions below is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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